

**Harbison-Walker Refractories, Division of Dresser Industries, Inc. and Alex B. Youstic. Case 6-CA-13219**

January 7, 1982

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On September 2, 1981, Administrative Law Judge Donald R. Holley issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order,<sup>2</sup> as modified herein.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Harbison-Walker Refractories, Division of Dresser Industries, Inc., Clearfield, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Alex B. Youstic on September 11, 1979, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

WE WILL NOT discourage employees from filing grievances with United Steelworkers of America, Local 75, AFL-CIO-CLC, or any other labor organization representing our employees, by discharging employees because they engage in such activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Alex B. Youstic immediate reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, with interest.

WE WILL expunge from our files any reference to the discharge of Alex B. Youstic on September 11, 1979, and WE WILL notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future discipline against him.

**HARBISON-WALKER REFRATORIES,  
DIVISION OF DRESSER INDUSTRIES,  
INC.**

**DECISION**

**STATEMENT OF THE CASE**

DONALD R. HOLLEY, Administrative Law Judge: Upon an original charge and an amended charge filed by Alex B. Youstic (herein called the Charging Party or Youstic), the Acting Regional Director for Region 6 of the National Labor Relations Board (herein called the Board), issued a complaint on April 24, 1980, alleging, *inter alia*, that Harbison-Walker Refractories, Division of Dresser Industries, Inc. (herein called Respondent), discharged Youstic on September 10, 1979, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged in the complaint.

The case was heard in Clearfield, Pennsylvania, on October 10, 1980. Subsequently, the parties filed briefs which have been carefully considered.

Upon the entire record and from my observation of the demeanor of the witnesses while they testified, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a Delaware corporation, operates three refractory brick plants in Clearfield, Pennsylvania. Its No. 2 plant is the only plant directly involved in this proceeding. During the 12-month period preceding issuance of the complaint, Respondent purchased from suppliers located outside the Commonwealth of Pennsylvania goods and materials valued in excess of \$50,000, and during the same period it sold finished products valued in excess of \$50,000 to customers located outside said State. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that United Steelworkers of America, Local 75, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Respondent's Business Operation

Respondent operates three brick plants in the Clearfield, Pennsylvania, area. Prior to midsummer of 1979,<sup>1</sup> it had operated its No. 2 plant with a skeleton crew of 15-20 employees. Those employees manufactured brick at the plant, but it was sent to the No. 3 plant for burning in the kiln.

At some unstated time, Respondent received a sizeable order for coke oven brick and decided to reactivate the kiln at its No. 2 plant to produce the order. Such decision dictated that the size of the work force be increased to approximately 70 employees. Alex Youstic, several supervisory personnel, and others were hired as a result of the expansion.<sup>2</sup>

#### B. The General Counsel's Case

Youstic was hired as a maintenance mechanic by Respondent at its No. 2 plant on August 6. He was terminated on September 11, shortly before the end of his 240-hour probationary period. Counsel for the General Counsel contends that Youstic frequently complained because employees other than maintenance mechanics performed maintenance work during his short tenure, and Respondent terminated him because he engaged in such protected concerted and/or union activity. She sought to prove her contention through the testimony of Youstic and employees Anthony Spagnolo, Pete Pontillo, Randy

Starck, and Nicholas Nylwalk. The pertinent testimony given by such employees is summarized below.

When Youstic was hired, Respondent operated its No. 2 plant around the clock. He testified he was originally assigned to the second shift (7 a.m. to 3 p.m.) where he was to receive training in the maintenance of brick presses from Anthony Spagnolo, a 40-year employee who also happened to be the recording secretary of the Union. Youstic testified he worked on the day shift with Spagnolo for 2 weeks and that during that period he and Spagnolo discussed the collective-bargaining agreement between the Union and Respondent, with Spagnolo emphasizing the work jurisdictional rights of maintenance mechanics.<sup>3</sup> During one of the conversations, Youstic claims he told Spagnolo he had observed the third-shift foreman, Albert Mayer, operate a brick press while operators just stood around and watched.<sup>4</sup>

Several weeks into his employment, Youstic was working on the 3 to 11 p.m. shift when employee Randy Starck, a press operator, put a brand on a brick mold. At the time, Youstic was working with maintenance mechanic Dave Davis, who had been hired shortly before Youstic was hired. Youstic brought Starck's activity to Davis' attention and informed him that he (Davis) rather than Starck should be performing the work which was maintenance mechanic's work. He also told Davis that there was a possibility that a grievance could be filed against him for permitting an operator to perform maintenance work.

According to Youstic, Foreman Mayer approached him the day after the above-described incident and informed him he had received a complaint that Youstic had been snapping at the men. Youstic claims he told Mayer he had not realized he had snapped at anyone and, if he had, he had not done it maliciously. Youstic testified that he later told several employees of his conversation with Mayer and indicated to them that if they had done the complaining he wanted them to know he had not intended to snap at them.

On September 7, a Friday, Youstic and others were asked to work a double shift because the floor of the kiln had heaved up when it was activated and several cars loaded with brick were wedged between the roof and the floor of the kiln. Youstic testified that, at the beginning of the 3 to 11 p.m. shift, he and maintenance mechanic Davis were assigned to perform maintenance work on brick presses and all the other employees were taken by Foreman Mayer to the kiln where they attempted to remove the stuck cars and brick by cutting the cars with a torch to facilitate their removal. Sometime during the evening, Local Union President Pete Pontillo approached Youstic and asked where the rest of the men were. Youstic told him they were all in the kiln with Mayer. According to Youstic, Pontillo entered the kiln, came back out with Foreman Mayer and the entire crew, and Pontillo and Mayer then conversed in an office for

<sup>1</sup> All dates herein are 1979 unless otherwise indicated.

<sup>2</sup> Supervision of employees working at the No. 2 plant at all times material was accomplished by: John F. Strathern, manager of Respondent's three Clearfield plants; Walter Clark, general foreman of the No. 2 plant; William H. Teufel, personnel manager; and Shift Foremen Albert Mayer, Jeffrey Peteuil, and Alan Fisch. It was admitted, and I find, that such individuals are agents of Respondent and are supervisors within the meaning of Sec. 2(11) and (13) of the Act.

<sup>3</sup> Respondent's payroll records reveal Youstic was transferred to the 3 to 11 p.m. shift 1 week after he was hired.

<sup>4</sup> No grievance was filed as a result of the discussion and the record fails to reveal that management learned of it.

1-2 hours while the employees stood around doing nothing.<sup>5</sup>

After Pontillo came out of the kiln, Youstic spoke with his fellow mechanic, Davis, and informed him that Pontillo was concerned with contract violations. He further indicated that, if he had not been a probationary employee, he would have filed a grievance. As Davis had then completed his probationary period, Youstic suggested that he file a grievance. Davis failed to indicate whether he would file one. Later the same night, Youstic spoke with forklift operator Witherow, indicating that Witherow and Starck had violated the contract by performing the work of maintenance mechanics. According to Youstic, Witherow told him he felt they should all work together to get the kiln repaired so no employees would be laid off.<sup>6</sup> Youstic informed Witherow he believed he would file a grievance.

According to Youstic, he last worked at Respondent on Monday, September 10. He testified that, at the end of his shift that day, Mayer, who was accompanied by first-shift Foreman Peteuil, told him he was sorry but he had to let him go. What was said thereafter is in dispute. Youstic's version is that he asked the reason and Mayer initially told him he was not cooperating with or getting along with the other employees. Youstic contends he disagreed and asked if he could bid onto a different shift. He claims Mayer replied that he did not think Youstic was a good employee for Harbison-Walker; that he knew there was a lot of union activity going on in No. 3 plant—people filing grievances and so forth—and he did not want this going on in his plant as he wanted a perfect shift. Youstic testified Mayer told him he was a good mechanic but he could not use him because he could not get along with people.<sup>7</sup>

On the morning following his termination, Youstic went to the plant to see General Foreman Walter Clark. When he arrived, Clark was not in and he spoke with the maintenance foreman, Alan Fisch. When Youstic told Fisch he had been terminated, Fisch asked the reason. Youstic told him Mayer felt he had not been cooperative and could not get along with people. Youstic claims Fisch replied that did not sound right because he had worked with him and had no problems with him. At that point Clark came in and indicated he was aware Youstic had been fired the night before, and Youstic asked him if there was any possibility of him bidding on another job. According to Youstic, Clark told him he

could not bid on another job and indicated he would back up his foreman who he understood had decided to fire Youstic because he was not cooperating or getting along well with other employees and he had been observed talking to union officials and that was enough cause for him to be terminated.

After speaking with Clark, Youstic visited Respondent's personnel manager, William Teufel. Youstic testified Teufel reiterated that he had been fired because he was uncooperative and did not get along well. Youstic stated he asked Teufel if his speaking with union officials had anything to do with his getting fired and Teufel replied, "No, that's not true, that has nothing to do with it." Youstic asked Teufel if he could bid into a different job and Teufel said no, that he did not think Youstic would be a good employee for Harbison-Walker.

About 2 weeks after his termination, Youstic returned to the plant to pick up his last paycheck. On that occasion, which he places as occurring on Wednesday, September 27, he claims he visited the office of John Strathern, manager of all three plants. During this conversation Youstic claims Strathern stated that Mayer told him Youstic was not cooperating with the men and could not get along well, and also that he had been seen talking to union officials. Youstic asked if there were any possibility of work in a different area and Strathern replied that he would look into it, but that Youstic should not get his hopes up. Strathern further stated that if he had been present at the time that Youstic had been fired things might have worked out differently.

While the General Counsel's case is largely dependent upon my acceptance of Youstic's testimony, supportive testimony was offered through employee witnesses Spagnolo, Pontillo, Starck, and Nylwalk. Spagnolo, who trained Youstic and thereafter remained in daily contact with the employee, testified he got along with Youstic and observed no conflict between Youstic and other employees. Additionally, he testified he could not recall any other probationary employees being fired during his 40 years at Respondent. He indicated he knew several employees who are hard to get along with who are still working at Respondent.<sup>8</sup>

Employee Pontillo testified that prior to Youstic's termination some of the employees told him they had been irritated by Youstic on occasion because he felt he knew everything. The first time he heard it, Pontillo stated he went to Youstic and told him to watch what he was doing because he was on probation. While Pontillo corroborated Youstic's testimony that Youstic had informed him others were performing mechanics' work in the kiln, he testified he did not tell Mayer or any other supervisor that Youstic had complained. According to Pontillo, when he entered the kiln on the occasion in question, he saw Witherow doing mechanics' work and he told Mayer if he had Witherow do the work he would have to pay a mechanic who was at home. Pontillo described the conversation with Mayer as a friendly one which lasted a minute or two.

<sup>5</sup> I do not credit Youstic's testimony that Mayer met with Pontillo for 1-2 hours while the men did nothing. Pontillo and Foreman Peteuil, who claims Pontillo spoke to him rather than Mayer on the occasion under discussion, both claim the discussion took just a few minutes.

<sup>6</sup> Prior to the occasion described, Witherow, a former construction foreman, had informed Youstic he had no use for unions.

<sup>7</sup> In a letter to the Regional Office placed in the record as G.C. Exh. 2a, Youstic described his termination, stating:

At the end of the shift, Al Mayer called me in the office and said he would have to let me go. He said he could not let me continue working because I had 237 hours of a "240 hour probation period completed and after that he couldn't get rid of me"! He said his reason was that I did not get along with the men! He said he was satisfied with my work but that he wanted a "perfect shift."

Similarly, in his pretrial affidavit, Youstic indicated Mayer stated the reason for his decision to discharge was "that I did not get along with the men . . . he was satisfied with my work but wanted a perfect shift."

<sup>8</sup> The record reveals that such employees are regular employees who have completed their probationary period.

Press operator Randy Starck indicated during his testimony that, on an occasion in early September, employee Witherow came to the kiln and informed him, in the presence of Foreman Mayer and Peteuil, that Youstic had told him (Witherow) he was going to file a grievance for running a torch in the kiln. He testified he thought Mayer may have heard Witherow's comments. Starck agreed when he appeared as a witness that he had stated in his pretrial affidavit that Youstic had an abrasive personality, felt he knew more than anyone else, and was always giving orders.

Employee Nick Nylwalk, the General Counsel's last witness, testified he is a maintenance mechanic on the day shift, that he had worked with Youstic and could say nothing against him. He indicated he was unaware of any other probationary employees being fired prior to the time Youstic was terminated.

### *C. Respondent's Defense*

Respondent claims the sole reason for its decision to terminate Youstic during his probationary period was the fact that he had an abusive personality and could not work in harmony with other employees. Management officials Strathen, Clark, and Mayer vigorously denied saying anything to Youstic at or near the time of his termination which would indicate in any way that his participation in union activities caused his termination.

Youstic's immediate supervisor, Mayer, testified that, within a short time after Youstic transferred to the 3 to 11 p.m. shift, he learned, through direct observation and through comments made by employees to him, that employees Steve Webb, Dave Davis, Oliver Smeal, Wayne Witherow, and Randy Starck did not care for Youstic and did not want to work with him.<sup>9</sup>

While Mayer did not indicate precisely when the employees named above complained to him, he testified the complaints caused him to inform General Foreman Clark of the complaints at a foremen's meeting held on August 23. Mayer claims he then told Clark he did not think Youstic would make it through the probationary period.

Clark testified that he discussed the Youstic situation with Personnel Manager Teufel after the August 23 meeting and Teufel agreed to attend the next meeting scheduled for August 30.<sup>10</sup> While Clark and Mayer claim they told Teufel at the August 30 foremen's meeting that they wanted to terminate Youstic before the end of his probationary period, the record reveals Teufel informed them Youstic should be warned before they terminated him.

As revealed above, Mayer did not actually warn Youstic in accordance with Teufel's suggestion. Instead, he

merely told him employees had complained to him that he had been snapping at the men.

Mayer and Clark both indicated during their testimony that Youstic was discussed once again at the foremen's meeting held on September 6, and they decided at that time he would be terminated before the end of his probationary period. Teufel testified that Clark informed him on September 6 or 7 that Youstic had not improved and they still wanted to fire him.

Turning to the Friday, September 7, incident in the kiln, General Foreman Clark testified the kiln was operative throughout the month of August and malfunctioned on September 3 rather than in mid-August as indicated by Youstic. While Youstic claimed that Pontillo and Mayer left the kiln and talked in an office for 1-2 hours on Friday evening while the men just stood around, Mayer testified Pontillo did not speak with him at all on the occasion in question—that the discussion was with Peteuil, foreman for the 11 p.m. to 7 a.m. shift. Peteuil, Peteuil corroborated Mayer and claimed, as had Pontillo, that the conversation lasted only a minute or two. Clark testified Pontillo told him the next morning that several employees had been working out of their job classifications in the kiln the night before.<sup>11</sup>

According to Mayer, he realized during the 3 to 11 p.m. shift on Tuesday, September 11, that overtime would be included when determining when a probationary employee had completed 240 hours of work and this caused him to check Youstic's hours. In checking, he determined that Youstic could not work another shift without exceeding 240 hours, and that discovery led him to call Personnel Manager Teufel at home during the dinner hour to obtain clearance to terminate Youstic. Teufel concurred in his recommendation and advised that Mayer inform Youstic of his fate in the presence of Shift Foreman Peteuil when the latter came to work at or about 10:30 p.m.

Mayer testified he called Youstic into the office at or about 10:30 p.m. and informed him he was sorry but he was going to have to let him go. When Youstic indicated he could not understand why he was being fired, Mayer asserts he explained he just did not fit in with his crew and he wanted a crew that worked together. Thereafter, Mayer informed Youstic he had to make the decision right then because his probationary period was ending and he had decided he did not want him on his shift. Mayer recalled he indicated he wished he had another alternative, like trying Youstic on a different shift, but he had no such option. Mayer denied that he made any reference to the Union during the discussion.

Clark acknowledged during his testimony that Youstic came to see him in his office the morning after he was terminated. His account of the discussion was that he merely indicated Mayer had informed him he had decided on the action because Youstic could not get along with other people on his shift, and he was abiding by

<sup>9</sup> Mayer indicated he witnessed an altercation between press operator Webb and Youstic during which Youstic told Webb to turn his machine over and Webb took offense indicating Youstic was not his boss. He testified that Smeal, an equipment operator, complained to him that "you could not tell Youstic anything" and asserted that employee Davis told him the same thing. He testified Witherow may have told him Youstic complained because he (Witherow) and Starck operated a torch in the kiln, and that Starck relayed messages concerning Youstic to him in the lunchroom.

<sup>10</sup> The persons normally attending such meetings were Clark, his three shift foremen, and the maintenance foreman.

<sup>11</sup> Pontillo indicated that his technique was to simply advise the new management officials at the No. 2 plant informally when they did something which might constitute a contract violation. He also indicated his approach caused correction of such situations without animosity or the necessity for filing of a formal grievance.

Mayer's decision and would back him up. Clark indicated he asked Youstic at the time if Mayer had talked to him about getting along with others, and Youstic replied he had but in his view the problems he had with other people on the shift were not that major and Mayer was wrong.

Personnel Manager Teufel also verified the fact that Youstic spoke with him the morning after his termination. Teufel subsequently reduced his conversations with Youstic to writing as Mrs. Youstic telephoned him later in the day and threatened to go to the NLRB. Teufel's memorandum was placed in the record as Respondent's Exhibit 2. It states:

On Wednesday, September 12, 1979, Alex Youstic requested to discuss his termination in his probationary period with me. Alex claimed his termination was unfair and his supervisor Al Mayer had made a wrong decision. Alex explained he was terminated because of his inability to work well with his peers and that was an untrue statement on Mayer's part. Alex first claimed he was never talked to about this and later said Mayer did tell him about 2 weeks ago that "he snapped at the men." When questioned Alex stated that was *all* Mayer said; however, further in the discussion Alex said Mayer told him of his inability to work well with his peers.

I explained to Alex that his inability to work well with his peers had been discussed with me previously and that was the reason this problem was discussed with him. I further explained the need for a cohesive work group and that Mayer was his supervisor and his instructions should be followed unless it would endanger an employee's safety. If Alex felt Mayer had made a poor decision on work assignments he could question Mayer; however, Alex had questioned Mayer on a frequent basis and even with his peers he questioned their suggestions and recommendations.

Alex then began saying he had 5 children and a wife to support and his image in the community would be discolored because of his termination and requested consideration for re-employment. I explained there was nothing the Company could do and that he should not allow this situation to destroy his life. Alex claimed he would not let this situation die and would do something about it.

9/12/79 Mrs. Youstic called and stated she and her husband were retaining an attorney and would process his claim to the NLRB. She was very pleasant and understanding but did not agree with anything I said.

Finally, Respondent's manager of all three Clearfield plants, Strathen, testified that Youstic came to his office to discuss the termination on a date he could not recall. Strathen testified Youstic wanted to know why he had been terminated and he explained to him that the shift foremen, the plant manager, and the personnel manager said that he could not get along with people and he was terminated for that reason. Strathen denied that he said anything at the time about union activities or anything of

that nature. He indicated he makes a final decision on discharge upon the recommendation of the shift foreman, the plant manager, and the personnel manager. He testified his recollection was that he had talked to Clark, Mayer, and Teufel the day before Youstic's discharge and had concurred in the decision to terminate Youstic at that time.

#### D. Analysis and Conclusions

The instant case poses two basic issues. The first is whether Youstic's version of his conversations with Mayer, Clark, and Strathen is reliable, and the second is whether the reason advanced by Respondent for its decision to terminate Youstic is a pretext advanced to mask an unlawful motivation for the decision to terminate the employee. I resolve the first issue in Respondent's favor and the second in the General Counsel's favor for the reasons indicated below.

While the statements attributed by Youstic to management officials Mayer (grievances at No. 3 plant and he desired a perfect shift), Clark (Youstic seen talking to union officials and that was enough reason for discharge), and Strathen (essentially the same comment allegedly made by Clark) would establish, *prima facie*, if credited, that Respondent terminated Youstic in violation of Section 8(a)(1) and (3), I cannot credit such testimony. Youstic was not a particularly impressive witness and he was unable to explain to my satisfaction why he failed to include in his original letter to the Board and in his subsequent investigative affidavit Mayer's alleged reference to a large number of grievances being filed at the No. 3 plant and his (Mayer's) desire to keep such activity away from his shift. Thus, as to the Mayer-Youstic conversation, I credit Mayer. Similarly, I refrain from crediting Youstic's assertion that Clark and Strathen told him one of the reasons for his termination was that he had been observed talking to union officials. In the first instance, Respondent caused Youstic to be trained by the Union's recording secretary, Spagnolo. Neither Spagnolo nor Youstic gave any testimony which would indicate that either ever informed management officials that they discussed anything other than work-related subjects. The only other union official Youstic talked to was Union President Pontillo and the record reveals Respondent's supervisors were in the kiln at the time and that neither Pontillo nor Youstic told any management officials any details of the conversation. Added to the above observations are Youstic's assertion that he discussed his termination with the Union and was informed they could do nothing about it and the fact that he did not seek NLRB assistance until more than 5 months after the termination. All considered, I cannot accept Youstic's claim that Clark and Strathen told him after his termination that he had been fired because he had been seen talking to union officials. The record facts and Youstic's post-termination actions convince me the testimony is not reliable.

Although I have not credited the direct evidence offered by the General Counsel which was intended to prove that Respondent terminated Youstic for discriminatory reasons, I am nevertheless convinced that he was

discharged because he had displayed a propensity to question the work assignments made by Foreman Mayer.

According to the scenario advanced by Respondent, Mayer and Clark concurred in the feeling that they would have to fire Youstic before the end of his probationary period as early as August 23. Teufel, the personnel manager, was so informed between August 23 and 30, and he attended the foremen's meeting held at the No. 2 plant on August 30 and advised that Youstic be warned. As indicated above, Mayer thereafter reprimanded rather than warned the employee and, according to both him and General Foreman Clark, they reported to Teufel on or immediately after September 6 that their final decision was that Youstic had to go. Although Teufel purportedly concurred in their decision, Youstic was not terminated until the end of his shift on September 11. In the interim, the kiln incident occurred and Mayer and Clark both admit they heard through the grapevine that Youstic had complained because others were doing mechanics' work. Moreover, during the interim period, Manager Strathen claims he talked to Teufel, Clark, and Mayer and decided the day before Youstic was terminated that their recommendation that the employee should be terminated should be accepted. Finally, for some reason, which was not adequately explained, Mayer telephoned Teufel at home on the night of the actual discharge to obtain his approval of his contemplated action.

Viewing the chronology of events set forth above, it appears to me that the final decision to fire Youstic was made on Monday, September 10, rather than on Thursday, September 6. In addition to the fact that Strathen indicated this was the case, I note that Mayer's Tuesday evening telephone call would have seemingly been unnecessary if the final decision had been reached on September 6.<sup>12</sup> Patently, if the decision to discharge was made on Monday, it was made immediately after Mayer and Clark learned that Youstic had indicated he might file a grievance because others had been assigned to perform the work of maintenance mechanics in the kiln over the weekend. While all of Respondent's witnesses claim that Youstic's efforts to enforce the collective-bargaining contract had nothing to do with his termination, the memorandum prepared by Teufel on September 13 belies such claims. Thus, in the memorandum, Teufel stated, *inter alia*:<sup>13</sup>

I explained to Alex that his inability to work well with his peers had been discussed with me previously and that was the reason this problem was discussed with him. I further explained the need for a cohesive work group and that Mayer was his supervisor and his instructions should be followed unless it would endanger an employee's safety. *If Alex felt Mayer had made a poor decision on work assignments he could question Mayer, however, Alex had questioned Mayer on a frequent basis and even with his*

*peers he questioned their suggestions and recommendations.* [Emphasis supplied.]

In sum, careful review of the entire record in this case convinces one that the testimony given by Respondent's witnesses Mayer, Clark, Teufel, and Strathen regarding the reason for the decision to terminate Youstic is no more reliable than Youstic's account of what was said to him at the time of discharge. It is clear that Teufel refused to approve line supervision's recommendation that Youstic be terminated because he could not get along with other employees on August 30; it is equally clear that he and Strathen subsequently approved a recommendation that Youstic be fired on September 10 and 11, respectively. The record reveals the only significant event which occurred during the interim period was the kiln incident. As Mayer and Clark were admittedly aware that Youstic had informed other employees at the time of that incident, that he felt a grievance should be filed over the incident and Teufel made pointed reference to the fact that Youstic had questioned Mayer's work assignment decisions in the memorandum previously discussed, I infer that top management was motivated to agree the employee should be fired when informed of his actions during the kiln incident. Accordingly, I find, as alleged, that Respondent terminated Alex Youstic because he engaged in protected concerted and/or union activities. By engaging in such conduct, it violated Section 8(a)(1) and (3) of the Act as alleged.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Alex B. Youstic on September 11, 1979, because he engaged in protected concerted and/or union activities, Respondent violated Section 8(a)(1) and (3) of the Act.
4. Respondent has not engaged in any unfair labor practices other than those specifically found herein.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be required to offer Alex B. Youstic reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which he had been performing. Additionally, Respondent will be ordered to make this employee whole for any loss of earnings he may have suffered by reason of his unlawful termination with backpay to be computed on a quarterly basis, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289

<sup>12</sup> Mayer offered no real explanation for the telephone call. He indicated he computed the number of hours Youstic had worked on September 11 "for some reason, whether I received another you know, another complaint or what."

<sup>13</sup> See Resp. Exh. 2.

(1952), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>14</sup>

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>15</sup>

The Respondent, Harbison-Walker Refractories, Division of Dresser Industries, Inc., Clearfield, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from filing grievances with the United Steelworkers of America, Local 75, AFL-CIO-CLC, or any other labor organization representing its employees, by discharging employees because they engage in such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Alex B. Youstic immediate reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice

<sup>14</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>15</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

to his seniority or other rights and privileges, and make him whole for any loss of earnings resulting from the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Clearfield, Pennsylvania, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint against Respondent be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

<sup>16</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."